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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (App. 35–50) are not reported. The opinion of the court of appeals (Pet. App. A, pp. 32–45) is reported at 450 F. 2d 125.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1971. A timely petition for rehearing, with a suggestion for rehearing *en banc,* was denied on December 9, 1971 (Pet. App. A, p. 46). The petition for a writ of certiorari was filed on January 24, 1972, and was granted on April 3, 1972

(App. 57). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon condemnation of a leasehold, a tenant with no right of renewal is entitled to compensation for the expectancy that the lease would have been renewed upon its termination.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part: "* * * nor shall private property be taken for public use, without just compensation."

STATEMENT

The United States brought this condemnation action to acquire petitioner's leasehold interest in an 0.75-acre parcel at Almota, Whitman County, Washington, in connection with the Little Goose Lock and Dam river improvement and navigation project on the Snake River. The district court entered judgment based on petitioner's theory that the compensation to which it was entitled was the market value of its leasehold taking into account the expectancy that the lease would be renewed upon its expiration. The court of appeals reversed and, in accordance with the government's contention, directed that judgment be entered based on an agreed value determined with reference to the remaining lease term without expectation of renewal.

1. The pertinent facts are undisputed. The land involved here was owned by the Oregon-Washington Railroad and Navigation Company, and was within the railroad's existing right-of-way. Petitioner leased the land from the railroad for a grain storage and shipment facility.

Petitioner's lease covered only the land for a 20-year term, and provided for an annual rental of $114.20. On the date of taking, seven and one-half years of the lease term remained. Petitioner had built and was using on the land a 522,500-bushel grain elevator and another, complementary building (App. 12–13). Petitioner had no right to renew the lease. Within six months after the lease term expired, petitioner was obligated to remove its improvements; otherwise the railroad would own them and could remove them at petitioner's expense. (App. 7, 12, 22–25.)

The parties stipulated that petitioner had occupied this land continuously under various leases from the railroad since about 1919 (App. 6, 16). The railroad leased lands owned by it to other grain elevator operators also. It had generally renewed and extended these various leases on the same or similar terms as the expired leaseholds, and "it was generally accepted by lessees of the railroad that such renewals * * * could be expected * * * so long as the lessee remains in business and is producing freight traffic for the railroad" (App. 25; see also *id.* at 16–17). As a result, prospective purchasers of leasehold interests (such as petitioner's) in railroad lands were willing to pay

more than the value of the bare legal rights owned by the tenant (App. 25–26).

The government sought to obtain all rights to the property in question. Prior to bringing the instant suit it settled with the railroad. The terms of that settlement were not brought out or urged as relevant in the present proceeding (Pet. App. A, p. 34).

2. The government then brought this action to acquire petitioner's "leasehold interest in said land [leased from the railroad] and the structures and improvements situated thereon, as said interest is set forth" in the lease agreement between petitioner and the railroad (App. 23–24). Although the lease provided that petitioner had the right to remove the structures and improvements at the end of the lease term, the parties stipulated that "the right to remove" those items was "excluded from th[is] proceeding" and revested in petitioner since the government did not need them (App. 28). Petitioner was given about six months to remove the improvements, during which time, and possibly for an additional month, it could occupy the land without payment of rent (App. 28, 33–34).

Petitioner claimed that the compensation to which it was entitled for its leasehold as thus modified "should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market * * *, with consideration being given to the probability or possibility that the leasehold interest would be extended * * *" (App.

27). At a pretrial conference it contended that the market value of this kind of leasehold "is the full market value of a fee interest therein less only the market value of the unimproved leased land" (App. 18); thus, it claimed compensation measured by the useful life of its improvements without regard to the remaining lease term. The government contended, on the other hand, that the compensation due petitioner "should be based upon the fair market value of the legal rights" which petitioner had under the lease, and that "no consideration should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the [petitioner's] leasehold interest could have been obtained from the lessor at a favorable rental" (App. 26). The parties agreed that under petitioner's theory it would receive $274,625, while under the government's theory it would receive $130,000 (App. 29–30).

The district court sustained petitioner's contentions, agreeing that its compensation should include "the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements" and "should not be limited by the bare legal rights" that petitioner had under the lease (App. 47, 48). The court of appeals reversed. It held that upon condemnation the government must pay only for legal interests, and that a tenant's expectancy that its lease will be renewed is not a compensable legal interest. Since the government's theory covered all of peti-

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tioner's legal rights at issue, the court ordered that judgment be entered on that basis.

SUMMARY OF ARGUMENT

The only question presented in this case concerns the "just compensation" to which the Fifth Amendment entitles petitioner because of the government's taking of its leasehold interest. While "just compensation" means that the owner of property condemned is to be put in as good position pecuniarily as he would have occupied if his property had not been taken, the compensation must also be just to the public. Petitioner's claim for additional compensation is based solely on the expectancy that its lease would have been renewed, a factor with respect to which petitioner has no legal right and is not entitled to any compensation.

A. The Fifth Amendment protects only property rights. Accordingly, the compensation which must be paid is limited to the value of the condemnee's legal rights in the property taken. This rule has been repeatedly invoked to deny recovery to a condemnee for values which, although generally related to the property taken, are neither part of nor a measure of the condemnee's legal rights.

The expectancies of tenants whose leases provide no right of renewal stand on no different constitutional footing than the expectancies of occupants who have no property interest. Accordingly, this Court squarely held in *United States* v. *Petty Motor Co.*, 327 U.S. 372, that a tenant's expectation that its leasehold would be renewed even though its lease did not

so provide is not a compensable element of value under the Fifth Amendment. As the Court explained, "[t]he fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (327 U.S. at 380, n. 9). Instead, a tenant is entitled to compensation measured solely on the basis of the "remainder of its term which existed after its ouster" (*id.* at 380).

B. The claim for additional compensation in this case is grounded wholly on petitioner's expectancy that its lease would have been renewed. But, as in *Petty Motor Co.*, this added nothing to petitioner's legal rights, which is all that the compensation required by the Fifth Amendment must cover. The court below, therefore, correctly applied the rule of *Petty Motor Co.*, in sustaining the government's theory which fully compensated petitioner for all its legal rights.

Adoption of petitioner's contention that the expectancy of renewal is an element of the leasehold's value which is taken into account in the open market, and thus should be considered in determining just compensation, would have anomalous results. Unquestionably, the railroad, or other private owner to which the railroad transferred its interest, could have declined to renew the lease and required petitioner to remove its improvements at the end of the lease term. Indeed, if the United States had taken the fee and simply waited for petitioner's lease to expire and for petitioner to remove its improvements, petitioner obviously would be entitled to no compensation. Petitioner

would have exhausted all the rights conferred by the lease—use and occupancy of the land and improvements during the lease term plus the right to remove the improvements when the lease ended. Those rights are the measure of compensation adopted by the court below.

The claim that the government should be required to pay an additional amount on condemnation, based on the tenant's renewal expectancy, would thus result in a *higher* measure of compensation because lands are being taken by the United States for public purposes, rather than being used for a different private purpose by a private owner. The Fifth Amendment does not mandate that it shall be more costly to put lands to public uses than to private uses.

The expectancy of renewal is therefore very different from conditions which may directly affect the use and occupancy of land (during the term of the lease), such as prospective competition, road conditions, and the like. Considerations of that kind may be taken into account in determining just compensation, and indeed that was done in this case. But the prospect of renewal is independent of a tenant's leasehold rights; instead, it is like the "numerous business [and other consequential] losses which result from condemnation of properties but which are not compensable under the Fifth Amendment" (*United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281).

Petitioner's rights in the improvements have been accounted for in this case. The government's theory fully compensated petitioner for the right to occupy

and use the improvements during the lease term. The only other right that the lease gave petitioner was ownership of the improvements and the right to remove them at the end of the lease. This was taken care of by the parties' agreement that this proceeding did not cover the right to remove and revesting that right in petitioner. The cases relied on by petitioner dealing with tenant leasehold improvements when there is no such agreement consequently are not apposite. At all events, those cases involved significantly different circumstances. To the extent they may have been grounded on compensating a tenant based on a mere possibility of renewal, they were incorrectly decided.

ARGUMENT

UPON CONDEMNATION OF A LEASEHOLD, A TENANT WHOSE LEASE DOES NOT PROVIDE FOR A RIGHT OF RENEWAL IS NOT ENTITLED TO ANY COMPENSATION BASED ON THE POSSIBILITY THAT THE LEASE WOULD HAVE BEEN RENEWED

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[1] This case involves the taking of a leasehold interest which petitioner, as tenant, owned by reason of a written lease agreement. It is agreed that the government "took", in the Fifth Amend-

[1] In addition to the Fifth Amendment, petitioner cites Section 111 of the Rivers and Harbors Act of 1970 (84 Stat. 1821, 33 U.S.C. 595a). As discussed *infra*, n. 8, p. 23, Section 595(a) has no application to this case.

ment sense, all that petitioner owned with respect to its leasehold. There is also agreement that the tenancy for years which petitioner's leasehold gave it was "private property" for which petitioner must be paid. See *Duckett & Co.* v. *United States,* 266 U.S. 149, 151; *United States* v. *General Motors Corp.,* 323 U.S. 373, 378. The only question presented concerns the "just compensation" to which petitioner is entitled as a consequence thereof.

Just compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States* v. *Miller,* 317 U.S. 369, 373 (footnotes omitted). The compensation must, however, be "just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl* v. *School District, Lake County,* 133 U.S. 553, 562; accord, *Bauman* v. *Ross.* 167 U.S. 548, 574.

In the present case, petitioner has received full compensation for the legal rights that it owned under its leasehold—the right to occupy and to use the leased land and the improvements constructed thereon for the remainder of the lease term, and the right to remove the improvements at the end of that term. Petitioner's claim for additional compensation is based solely on the expectancy that its lease would have been renewed, a factor with respect to which, it is conceded (see Pet. Br. 2, 9, 16–17), petitioner had no legal right. The rejection of that claim by the court below was correct under settled principles of federal law.

A. THE FIFTH AMENDMENT REQUIRES THE UNITED STATES TO PAY ONLY FOR PROPERTY TAKEN, AND NOT FOR OTHER VALUE THAT MAY BE LOST.

1. It is firmly established in federal eminent domain law that the "existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319. The Fifth Amendment protects only property rights; there is no requirement that the government compensate "for opportunities which the owner [of the property taken] may lose" (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282), such as frustrated business opportunities (*Omnia Co.* v. *United States*, 261 U.S. 502) or even the consequential destruction of a business (*Mitchell* v. *United States*, 267 U.S. 341). "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Co.*, 324 U.S. 499, 510 (citations omitted).[3]

[3] See, also, *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *United States* v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Co.* v. *United States*, 343 F. 2d 422 (C.A. 10), certiorari denied, 382 U.S. 830; *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cl.).

In this respect, the Fifth Amendment differs from the constitutions and laws of some states, which "require that compensation be made for consequential damages to private property resulting from public improvements." *Mitchell* v. *United States*, 267 U.S. 341, 345–346. See also, *Chicago* v. *Taylor*, 125 U.S. 161.

Consequently, the compensation that must be paid is limited to the value of the condemnee's legal rights in the property taken. This rule has been repeatedly invoked to deny recovery to a condemnee for values which, although generally related to the property taken, are neither a part of nor a measure of his legal rights in that property. For example, elements of value based on the fact that the property has a special value to its owner or to the taker, and values attributable to the proposed government project itself, are excluded from the compensation the government is required to pay. *United States* v. *Cors*, 337 U.S. 325, 332–334; see *Shoemaker* v. *United States*, 147 U.S. 282, 303–305; *United States* v. *Miller*, *supra*, 317 U.S. at 376–379; *United States* v. *Reynolds*, 397 U.S. 14, 16. Similarly, in *United States* v. *Rands*, 389 U.S. 121, the Court held that the compensation which the United States is constitutionally required to pay when it condemns riparian land does not include the land's value as a port site, since the special values that inhere in the flow of navigable waters are part of the public domain.[8] And, in the absence of treaty obliga-

[8] See, also, *Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69; *United States* v. *Willow River Co.*, 324 U.S. 499, 509; *United States* v. *Twin City Power Co.*, 350 U.S. 222, 227–228; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 233; *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 629.

In *United States* v. *Fuller*, No. 71–559, which is set for

tions, the permission granted Indian tribes to continue in possession of aboriginal lands "is not a property right but amounts to a right of occupancy which * * * may be terminated * * * by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279. Like those using or occupying the public domain, persons using or occupying private property by virtue of a license or contracted right, without any legal interest in the land itself, are not entitled to compensation when the property is taken by condemnation. *Chicago, M., St. P. & P.R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 138 F. 2d 268 (C.A. 8), certiorari denied, 320 U.S. 804; *Sinclair Pipe Line Co.* v. *United States*, 287 F. 2d 175 (Ct. Cl.).

2. The expectancies of tenants whose leases provide no right of renewal stand on no different constitutional footing than the expectancies of occupants who have no property interest. Accordingly, in *United States* v. *Petty Motor Co.*, 327 U.S. 372, a decision that

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argument with the present case, we contend that this rationale is fully applicable when the United States condemns ranch lands adjoining public lands on which the owner holds revocable grazing permits under the Taylor Grazing Act. Although such permits undoubtedly are of value to the permittees, it has consistently been held that the United States may revoke them without being liable under the Fifth Amendment, since the permits confer no compensable property interest in the public lands. See our brief in *Fuller*, p. 10.

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would appear to be conclusive here, this Court held that a tenant's expectancy that its leasehold would be renewed upon expiration even though its lease did not provide for renewal is not a compensable element of value under the Fifth Amendment. In that case, month-to-month tenants whose leaseholds were condemned asserted a claim for compensation based on the increased market value that the leaseholds allegedly had because they might be renewed. The district court concluded that since the tenancies in fact might have continued, the jury should consider that factor in determining the values of the tenancies. The court of appeals affirmed the ensuing jury awards based on the instructions to take into account the renewal possibility, noting that "each [month-to-month] tenant * * * had every reason to think he could remain indefinitely as a tenant, and the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (147 F. 2d 912, 913).

This Court reversed, holding, *inter alia,* that each tenant was entitled to compensation measured solely on the basis of the "remainder of its term which existed after its ouster" (327 U.S. at 380). For the month-to-month tenants, the remaining term depended upon the applicable state law "on the requirement for notice to terminate" that type of tenancy (*ibid.*).[4] The Court emphatically rejected the contention that the compensation payable to any tenant should include an

[4] One tenant involved in the *Petty Motor* case had a written lease agreement specifying a primary lease term and granting

allowance for the possibility that a lease might be renewed (327 U.S. at 380, n. 9):

"The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N.E. 763 [per Holmes, C.J.]:

> 'It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase from that source.' "

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the tenant the right to a renewal term. The Court stated that for that tenant, "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy" (327 U.S. at 381). In the instant case, of course, petitioner's lease granted it no right of renewal.

B. UNDER THE DECISION BELOW PETITIONER IS PAID FOR ALL ITS LEGAL RIGHTS IN THE LEASEHOLD TAKEN AND THUS IS FULLY COMPENSATED AS REQUIRED BY THE FIFTH AMENDMENT

1. As set forth above (*supra*, pp. 4–5), the present proceeding initially involved petitioner's entire leasehold interest in the land covered by its lease and the improvements that it had built thereon. The parties subsequently agreed, however, to exclude one element of petitioner's leasehold interest—the right to remove the improvements when the lease term expired was revested in petitioner, and it was allowed time to do so. The parties also agreed concerning the compensation for petitioner's leasehold interest without the removal right, except as regards the factor in issue here; as regards that factor, petitioner claimed that in determining compensation "the probability or possibility that the leasehold interest would be extended" should be considered, while the government contended that "no consideration should be given to any additional value" attributable thereto (App. 27, 26).

The theory petitioner asserts here, like that of the tenants in *Petty Motor Co.*, is based wholly on the renewal expectancy existing by reason of the railroad's past practice of renewing and extending its tenants' leaseholds. But "[t]he fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (*Petty Motor Co., supra*, 327 U.S. at 380, n. 9). And the compensation required by the Fifth Amendment is limited to the tenant's legal rights, and hence is to be determined solely on the basis of the remaining lease term.

In this case, therefore, the court of appeals correctly applied the rule of *Petty Motor Co.* in sustaining the government's theory, which, as is conceded, fully compensated petitioner for all its legal rights.

The Court of Appeals for the Tenth Circuit recently reached the same conclusion in *Scully* v. *United States*, 409 F. 2d 1061, certiorari denied *sub nom. Meisinger* v. *Scully*, 396 U.S. 876. The tenant in *Scully* leased farm land on an annual basis, and owned all the improvements (house, barn, fences, etc.) located thereon. Other tenants had similar leases with the same landlord, and the leases were customarily renewed year after year, even though the tenants had no legal right of renewal. As a consequence, the so-called "Scully leases" had a market value greater than the value of the one-year term and the improvements. The district court took this into account in determining the compensation due the tenant when the government condemned the land.

The landowner appealed[*] and the court of appeals

[*] The principal issue in *Scully* concerned distribution of the condemnation award between the landowner and the tenant. The landowner asserted in the court of appeals that the tenant's award was based on an interest greater than merely the one-year term of the lease; the government appeared in that court solely to request that the total award be approved and to indicate that it had no interest in the question of distribution between landowner and tenant (409 F. 2d at 1063). In its memorandum in opposition to the tenant's petition for a writ of certiorari, however, the government noted that the tenant's contentions might result in the United States having to pay more than the value of the respective parties' legal interests in the condemned land, and stated that the court of appeals had "correctly applied the rule of" *Petty Motor Co.* and properly limited the tenant's award to the value of its remaining lease

reversed the award to the tenant. It held that the custom of renewing Scully leases over an extended number of years could not create a legal interest in the tenant beyond the one-year term since the lease did not provide for a right of renewal. The court also rejected, on the authority of *Petty Motor Co.*, the alternative contention that, even viewing the lease as a one-year lease, the tenant's compensation should be measured in terms of market value including the renewal expectancy, since the expectancy was reflected in dealings on the open market. For, as in *Petty Motor Co.* and in the *Emery* v. *Boston Terminal Co.* case on which it relied, the expectancy added nothing to the tenant's legal rights, which is all that must be paid for. Cf. *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 175 (C.A. 9), certiorari denied, 340 U.S. 820.

2. Petitioner argues, however, that its market value theory does not involve compensation for a renewal expectancy as such. Rather, it contends, the only issues are what elements go into determining "just compensation" for its leasehold rights, and whether the computation thereof should include "consideration of some reasonably probable uses to which the property might be put at the end of the lease term"—more specifically, "the reasonable probability of continuing the use of the buildings in place upon the leased premises" (Pet. Br. 17). Since this factor is taken into account in the open market, and presum-

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term without allowance for the renewal expectancy (Memo. in Opp., p. 3, No. 396, O.T., 1969).

ably would there enable petitioner to obtain from a prospective purchaser the amount it is claiming under its theory, it follows, petitioner urges, that "[t]he probability of a renewal of the lease * * * is an element of value to be considered" (*id.* at 30).[6]

Petitioner's proposed circumvention of the rule of *Petty Motor Co.* would have anomalous results. Unquestionably, petitioner's landlord, the railroad, could have declined to renew the lease and required petitioner to remove its improvements at the end of the lease term so that the land could be used for a different purpose. Or the railroad could have sold its underlying fee interest in the land to another private owner, who might have done the same thing. In either event, petitioner under its lease would have received only the use and occupancy of the land and buildings during the remaining term, plus the right to remove the improvements at the end of the term. That, of course, is precisely the measure of compensation which *Petty Motor Co.* requires (see 327 U.S. at 380–381), and is the measure of compensation adopted by the court of appeals here. See, also, *Southern California Fisher-*

[6] Petitioner's contentions parallel those made by the tenant in *Scully* and summarized by the court of appeals there as follows (409 F. 2d at 1065): "The lessee contends * * * that even if his leasehold estate is viewed as a simple one year term, he is nevertheless entitled to recover the amount that would have been received had the lease been sold in the open market. Essentially, the argument is that the likelihood of renewal added to the value of the lease; the government's obligation in fixing a just compensation is measured in terms of market value; the renewal expectancy is reflected in the fair market value and therefore must be recoverable."

man's Ass'n v. *United States*, 174 F. 2d 739, 740 (C.A. 9).

Yet, petitioner claims that the government should be required to pay an additional amount when it condemns a tenant's leasehold, not because of the tenant's lease rights, but because of the prospect that the lease might be renewed.[1] There is no rational basis for requiring a *higher* measure of compensation because the lands are being taken by the United States for public purposes, rather than being used for a different private purpose by a private owner. Cf. *United States ex rel. T.V.A.* v. *Powelson*, *supra*, 319 U.S. at 278–279. The Fifth Amendment does not mandate that it shall be more costly to put lands to public use than to put them to

[1] In negotiating its lease with the railroad, petitioner surely took into account the likely value at the end of the lease term of the improvements that it contemplated building, or had already built, on the leased land. The lease agreement provides only for a right of removal; presumably, petitioner concluded that this provision adequately safeguarded its interests upon expiration of the lease, and that keeping the improvements in place, which could have been assured by such means as a renewal right, was not essential to it. Indeed, the lease does not merely give petitioner a right to remove the improvements, but requires it to remove them or forfeit ownership of them to the railroad, which could then remove them at petitioner's expense (App. 7, 12, 25). Thus, compensating petitioner for its rights when the lease expired only on the basis of its right to remove works no hardship on it, since that is precisely what the parties contemplated. Compare *Petty Motor Co.*, *supra*, 327 U.S. at 375–376, where the Court held that a tenant whose lease provided for "automatic termination" upon condemnation was not entitled to any compensation for its leasehold interest, on the ground that the tenant "had contracted away any rights that it might otherwise have had" (*id.* at 376).

private uses. Such a result would not comport with the principle that the compensation paid must be just, not merely to the condemnee, "but to the public which is to pay for it" (*Searl* v. *School District, Lake County, supra,* 133 U.S. at 562).

Moreover, the United States could have taken only the railroad's fee interest in the property and let petitioner continue under its leasehold until the term expired. If the government then did not renew the lease but instead required petitioner to remove its improvements, petitioner would not be entitled to any compensation. Its rights still would be controlled by the lease, and it would have received all that the lease gave it—use and occupancy during the lease term and the right of removal upon expiration. Compare *Messer* v. *United States,* 157 F. 2d 793, 794–795 (C.A. 5).

The prospect of renewal for which petitioner claims it should be compensated is thus wholly independent of its leasehold interest. Petitioner could realize fully the rights and privileges which the lease affords it without regard to renewal; indeed, renewal would become relevant only upon expiration of the term provided in the lease, at which point petitioner would already have realized all its rights under the lease except the right of removal.

The prospect of renewal, therefore, is very different from such matters as prospective competition, favorable road conditions, and similar considerations to which petitioner refers (see Pet. Br. 21, 24–25, 30–31). Because such factors may directly affect the use and occupancy of land (here during the remaining

lease term), the courts have held, as petitioner correctly notes, that such matters are relevant elements in determining the value of land and may be taken into consideration in fixing just compensation when an interest in the land is taken.

There can be no doubt that in the instant case allowance is in fact made under the government's theory for the relevant elements of value which properly may be considered. Since the parties excluded the right of removal from the case (*supra,* p. 4), the compensation payable under the government's theory is for petitioner's right to use and occupy the land and improvements during the remaining lease term. The computation is in accordance with the formula stated in *Petty Motor Co.* (327 U.S. at 381): "The measure of damages is the value of the use and occupancy * * *, less the agreed rent which the tenant would pay for such use and occupancy." Petitioner paid only $114.20 per year in rent, and for the remaining term of the lease (seven and one-half years) the total rent payable would have been about $900. The net compensation under the government's theory is $130,000; the value of petitioner's use and occupancy is the sum of that amount and the total rent payable, or $130,900. The fact that this figure is significantly greater than the rent petitioner is obligated to pay, and was agreed upon by the parties, presumably indicates that various elements of value concerning petitioner's use and occupancy—including those to which petitioner refers—were fully taken into account.

Petitioner's claim for additional compensation thus rests solely on the renewal prospect, and the fact that the government's taking frustrated this prospect and precluded petitioner from continuing its highly valuable occupancy beyond the term specified in the lease. But, as set forth above, renewal was not part of petitioner's leasehold rights. Instead, it was like the "numerous business [and other consequential] losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T.V.A.* v. *Powelson, supra,* 319 U.S. at 281; see, also, *Omnia Co.* v. *United States, supra; Mitchell* v. *United States, supra.*[8] Petitioner's argument that the possibility of renewal may nevertheless be considered as an element of value is, as the court below pointed out (Pet. App. A, p. 42),

[8] While Congress may, of course, provide for payment in excess of the just compensation that is constitutionally required (*e.g., Mitchell* v. *United States, supra,* 267 U.S. at 346; *United States* v. *Willow River Co., supra,* 324 U.S. at 510), it has not done so for this case. Section 111 of the Rivers and Harbors Act of 1970 (84 Stat. 1821, 33 U.S.C. 595a), on which petitioner places some reliance (see Pet. Br. 15, 18–19), does so in the limited situation it covers. But that statute has no application in the circumstance here. Stated simply, Section 595(a) provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, (3) the land is to be valued at its best use, even if dependent upon access to the navigable waters in question. The parties have agreed that the highest and best use of petitioner's leasehold interest "was that of a grain and pea storage and handling facility" (App. 13). Thus, there is no dispute in this case concerning highest and best use, nor is there any suggestion that access to navigable waters is in any way involved.

nothing more than an attempt to bypass the rule of *Petty Motor Co.*, and is in fundamental conflict with the decision in that case.[9]

3. Petitioner's real concern in this case appears to be with the compensation payable for its rights with respect to the improvements that it built on the land it leased. Pointing out that its rights in the improvements "did not end" upon expiration of the lease term, petitioner contends that "the lease renewal expectancy was an inherent element affecting [the improvements'] fair market value" (apparently even after the lease term expired), which was "entitled to consideration" (Pet. Br. 23; see, also, *id.* at 17–18).

Petitioner's rights in the improvements have been fully accounted for in this case. The lease gave petitioner essentially two distinct rights with respect to the improvements—the right to occupy and use them on the land during the lease term, and ownership of and the right to remove them when the term expired.[10]

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[9] Petitioner suggests that the rationale of *Petty Motor Co.* is inapplicable to the present case because *Petty* "deals only with the taking of a leasehold involving no tenant owned buildings" (Pet. Br. 32). But, in holding that the possibility of renewal is not a compensable element, this Court in *Petty* made clear that this was because such a prospect does not add to the tenant's rights. This is equally true in the present case as in a case like *Petty* involving only improvements that are more easily removable by a tenant; like petitioner, the tenant in that circumstance has only the right to remove the improvements, and he is to be compensated only for that right and the remaining lease term.

[10] Perhaps in part because of the very favorable rental fee (see *supra*, p. 22), petitioner was willing to assume the risk of building its improvements under the very limited legal protections provided by its lease. That risk included the possibility that the railroad or one who purchased the fee from

Petitioner does not suggest that the government's theory fails to provide full compensation for the first. And the second was taken care of by the parties' agreement regarding removal.

As previously noted, the parties stipulated that "the right to remove" the improvements "is excluded from the proceeding, and * * * revested in the former owner," *i.e.*, petitioner, and petitioner was allowed time to effect removal (App. 28). Apart from use and occupancy, this was the only other right that petitioner had under the lease. While it owned the improvements when the lease expired, its ownership did not entitle it to have or to use them on the land but was subject to petitioner's removing them, failing in which they became the railroad's property (App. 7, 12, 24–25). In agreeing to the stipulation, petitioner accepted this arrangement in full settlement of its ownership and removal rights at the end of the lease; presumably petitioner took into account whatever value the improvements had to it in place and concluded that removal under the stipulation was better from its viewpoint.

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it (whether by condemnation or otherwise) might choose not to extend the term of petitioner's lease. Petitioner's attempt to transfer the burden of that risk to the United States is without legal warrant. Compare *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 599 (the owner of improvements built up from low-water mark in the bed of a navigable stream is not entitled to compensation from the United States when it raises the water level of the stream, and thereby destroys the improvements, for the purpose of improving navigation, since "any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed [without compensation by a federal improvement of navigable capacity]").

Thus, the stipulation, we submit, provided for all of petitioner's rights upon expiration of the lease, so that valuation of petitioner's interest in the improvements at that point is not an issue in this case.[11] It follows that the cases on which petitioner relies dealing with tenant leasehold improvements when there is no such agreement—*United States* v. *Seagren*, 50 F. 2d 333 (C.A. D.C.); *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596 (C.A. 2); and *United States* v. *1,132.50 Acres of Land, Etc., Allegheny*, 441 F. 2d 356 (C.A. 2)—are not apposite. At all events, those cases involved significantly different circumstances, and, to the extent that those decisions are grounded on compensating a tenant based on the chance or expectancy of renewal, we believe they were incorrectly decided.

[11] Petitioner objects, however, that the court below did not apply the "unit rule" here, by valuing the land and improvements as though the lease did not exist (Pet. Br. 8, 33-34). But the railroad was not in this case because the government had settled previously with it. In this circumstance, the Court pointed out in *Petty Motor Co.* (327 U.S. 374), "the value of the use of the totality of property, which was taken, thus lost all meaning," and the government had "a separate responsibility to compensate [petitioner] for any legally recognized interest which [it] may have in the property. See *Duckett & Co.* v. *United States*, 266 U.S. 149." See, also, *Messer* v. *United States*, *supra*, 157 F. 2d at 795, n. 5. Moreover, where the ownership of property is divided, "the Constitution does not require a disregard of the mode of ownership— of the state of the title," or that "a parcel of land * * * be valued as an unencumbered whole when it is not held as an unencumbered whole." *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195. The division of ownership between landlord and tenant, as in this case, might well call for independent valuation

In *Seagren*, the United States declined to pay a tenant any amount for leasehold improvements (a gasoline station) which the tenant had built and was entitled to remove on termination, claiming that because of the removal right the improvements were not part of the realty which it had condemned but instead were "personalty, which it may order removed without payment" (50 F. 2d at 335). Thus, the government sought to escape all liability for the improvements, even though as a practical matter it had taken those items by its condemnation of the land because they could not be removed. The court held that the government could not avoid liability for the improvements by requiring the tenant to remove them. The same situation was presented in the *Borough of Manhattan* case. The government's declaration of taking excluded removable trade fixtures owned by tenants, based on which it asserted that it did not have to compensate the tenants for such items despite the fact that the fixtures could not be removed without loss of all or most of their value so that they were deemed part of the realty under state law. The court held that the government "cannot deny compensation for fixtures by simply writing an exception into the declaration of taking excluding from compensation property which is in fact taken" (388 F. 2d at 598; see, also, the earlier appeals in this case at 344 F. 2d 142, 144–146, and 306 F. 2d 439, 444–445). In the present case, by

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of each interest even if both parties were joined in the condemnation proceeding. See Johnston, "*Just Compensation*" *For Lessor and Lessee*, 22 Vanderbilt L. R. 293, 310–319 (1969).

contrast, the government took all of petitioner's interest in the improvements and agreed to compensate petitioner for that interest, and the only question concerns the proper measure of compensation. See *Messer* v. *United States, supra,* 157 F. 2d at 795.

To be sure, the Second Circuit in *Borough of Manhattan* also considered the measure of compensation for the tenant's fixtures.[12] On rehearing *en banc,* the court awarded compensation based on current cost less an allowance for deterioration "computed in the first instance on the basis of useful life and without regard to the term of the particular lease" (388 F. 2d at 601). It explained that merely because the tenants had short-term leases did not mean that they would not be able "to derive any value from their fixtures beyond the expiration of their leases" (*ibid.*). In effect, the court simply disagreed with the government's computation of an appropriate salvage value for the fixtures when the leases expired. Compare *United States* v. *1,132.50 Acres of Land, Etc., Allegheny, supra,* where the same court of appeals later sustained an award for the tenant's fixtures based on removal value, and rejected the depreciated reproduction cost data proffered by the tenant.

Moreover, in New York City, where the *Borough of Manhattan* case arose, the legislature has enacted rent control statutes that afford tenants extensive

[12] This was not an issue in *Seagren*, where the court pointed out that "No question is made here on the arithmetic, the United States apparently conceding the values * * *" (50 F. 2d at 334).

rights irrespective of the provisions of their leases. See Title 23, McKinney's Consolidated Laws of New York Ann. These statutes circumscribe carefully a landlord's rights to evict a tenant, even upon expiration of the term specified in the lease, thus in effect granting the tenant a renewal right by law. See *id.*, Sections 8528, 8558, 8585. This special legislation, which apparently covered all parties in the *Borough of Manhattan* case, might justify the result in that case even under the rationale of *Petty Motor Co.* To the extent that the Second Circuit's position may be based on compensating the tenant for the possibility that its lease might be renewed even though no right of renewal exists, we believe for the reasons set forth above that it is wrong under the decision of this Court in *Petty Motor Co.*

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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JULY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972